

No. 22,483

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

ROY O. DISNEY and EDNA F. DISNEY,

Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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OPINION BELOW

The opinion, and the findings of fact and conclusions of law of the District Court (I-R. 136-151) are reported at 267 F. Supp. 1.

JURISDICTION

This appeal involves federal income tax deficiencies for the years 1962 and 1963 totaling \$3,154.09. The taxes in dispute were paid on or about May 21, 1965 (I-R. 145), and claims for refund were filed on August 3, 1965 (I-R. 5, 7); the claims were rejected on April 12, 1966 (I-R. 146). Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on February 4, 1966,

the taxpayers 1/ brought this action in the District Court for recovery of taxes paid. (I-R. 2-8.) Jurisdiction was conferred on the District Court by 28 U.S.C. Section 1346. The judgment of the District Court was entered on July 7, 1967. (I-R. 152.) Within sixty days thereafter, on September 1, 1967, a notice of appeal was filed. (I-R 154.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether amounts which the taxpayer's employer paid to cover the foreign travel expenses of the taxpayer's wife--who accompanied him on his business trips but participated only in social activities and performed only incidental services for him--are includible in the taxpayer's gross income.

2. Whether, if includible, the taxpayer may deduct such amounts as ordinary and necessary business expenses.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and Regulations are set out in Appendix A, infra.

STATEMENT

The question here is whether amounts paid to the taxpayer as reimbursement for travel expenses of the taxpayer's wife who accompanied her husband on foreign business trips are includible in the

1/ Joint returns were filed by the husband and wife appellees. For convenience, this brief will refer only to the husband as taxpayer.

taxpayer's gross income and, if so, whether the taxpayer may deduct such amounts as ordinary and necessary business expenses.

During the taxable years 1962 and 1963 Mr. Roy O. Disney was president, chairman of the board, a director, and a member of the executive committee of Walt Disney Productions, posts which he held at the time of the trial of this case. (II-R. 16-17.) Walt Disney Productions is a well-known, publicly held corporation engaged in producing "family-type" entertainment. It derives its income primarily from theatrical distribution of motion pictures, but its business also includes operating Disneyland Park, character merchandising (e.g., marketing children's clothing, dolls and games modeled after Disney characters), publishing music, books and magazines, and distributing 16-millimeter motion picture films to schools and other nontheatrical markets. The company's operations are world-wide; it has subsidiaries, representatives, and licensees in 58 foreign countries. (I-R. 146.)

In 1962 and 1963 the taxpayer and his wife took three trips outside the country, and one trip within the country. The travel expenses of the taxpayer's wife on all of these trips, with the minor exception noted below, are the subject of this appeal.

On the first trip Mr. and Mrs. Disney traveled in January, 1962, for about 21 days from their residence in California to New York, Paris, and London. (I-R. 147; II-R. 23-24.) The purpose of the trip, concededly a business trip as far as Mr. Disney was concerned, was to gather the Disney sales forces in Paris and London,

bring them up to date on the company's new products, and invite exhibitors to screenings of the company's new products. (II-R. 24.)

There is very little evidence as to what Mrs. Disney did on this trip. Mr. Disney in general testified that he requested his wife to accompany him on his foreign trips because she could be helpful in promoting and publicizing Disney products. (II-R. 26.) He admitted that she had no "precise business function" (II-R. 92), and that she would not attend business meetings but "might stay in the hotel or twiddle her thumbs or walk the streets or go to a picture show or wait until I come home and then go to dinner with me" (II-R. 93). He further testified that she would do a good deal of shopping and would occupy herself with "what are essentially nonbusiness activities" during the times he was away from the hotel. (II-R. 94.)

Mrs. Disney in general testified that her duties were wifely and social. She answered the telephone, attended dinners and other social events with her husband's friends and business associates, took care of the laundry and dry cleaning, accompanied her husband to screenings, exhibitions, receptions, and press conferences, socializing with employees, keeping account of the company money spent, "being generally a helpmate" and giving Mr. Disney her "moral support." She testified that performing a wifely duty "is most of it, I would say." (II-R. 95; III-R. 169-170, 192-193.)

The second trip was a round-the-world trip taken in 1962 by the Disneys and Mr. and Mrs. Vogel, Mrs. Disney's sister and brother-in-law. The trip was concededly a business trip as to Mr. Disney

and a vacation as to the Vogels. The trip included numerous sight-seeing jaunts, including trips to the Hawaiian Outer Islands, tourist attractions in Japan and Thailand, the Taj Mahal in India, the Pyramids in Egypt, and a drive through Scotland and Ireland. Many, but not all, of these trips took place on weekends. (II-R. 112-126.) The Vogels paid their own expenses and were not reimbursed by Disney Productions; they are not involved in this controversy.

The evidence concerning Mrs. Disney's activities on this trip, apart from sight-seeing, is sparse. She attended screenings, cocktail parties, dinners, and apparently was present at a press conference held by Mr. Disney. (II-R. 30-32, 51.) She continued to perform such wifely duties as taking telephone messages, supervising her husband's laundry, and taking care of similar personal matters. When not sight-seeing or shopping, she spent a good deal of time during the day in her hotel and in the evening she accompanied her husband to social gatherings. (III-R. 193-197.)

The third trip in controversy, a 41-day trip to Europe in January of 1963, was undertaken by Mr. Disney to discuss the influence of the Common Market on Disney Productions and to attend a publishers' convention. (II-R. 60-61.) Again, the record is sparse as to Mrs. Disney's activities during this trip. Presumably, they were the same as her activities on previous trips; she took part in her husband's social activities and continued to perform personal errands for her husband.

The final trip involved in the case is a trip which took the Disneys to Colorado, Wisconsin, Buffalo and New York City. Mr.

Disney left New York for a quick trip to London and for the week he was absent Mrs. Disney remained in New York City. (I-R. 62-65.) There is no indication of what Mrs. Disney did while she was with her husband on this final trip, other than that, as to company affairs, she participated "in matters of the social side." (I-R. 63.)

The District Court found that "Mrs. Disney's presence on the round-the-world trip and the two trips to Europe served to enhance the firm's image abroad," that "She assisted her husband in business activities, and her travel was for a bona fide business purpose" and that her "travel expenses were properly excluded from gross income." It found "[a]s to her stay in New York * * * no evidence of a business purpose" and accordingly held that the "reimbursed cost of the week [there] * * * should be treated as additional compensation to Mr. Disney." (I-R. 142.)

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in excluding the reimbursed travel expenses of the taxpayer's wife from the taxpayer's gross income.
2. The travel expenses of the taxpayer's wife are not deductible by the taxpayer as his ordinary and necessary business expenses.

SUMMARY OF ARGUMENT

This case involves the question of the taxability of travel expenses paid by Mr. Disney's employer for the benefit of Mr. Disney's

wife who accompanied him on his business trips.

The District Court held that since Mrs. Disney's "travel was for a bona fide business purpose," the reimbursed travel expenditures did not constitute gross income to Mr. Disney. This holding was erroneous as a matter of law. Gross income is defined in the Code as "income from whatever source derived" and includes any economic benefit conferred on an employee as compensation whether in the form of cash, or goods and services. Since the company's reimbursements for Mrs. Disney's travel expenditures were not intended to be and did not constitute gifts to Mr. or Mrs. Disney, and since the payments do not fall within any of the other exceptions to inclusion in gross income contained in the Code, amounts reimbursed clearly constitute the taxpayer's gross income.

The basic question is whether the reimbursed travel expenditures, gross income to the taxpayer, would nevertheless be deductible by him as an ordinary and necessary business expense paid or incurred in carrying on his trade or business. Although the District Court did not pass directly on this question, it impliedly held that the amounts involved would be deductible for two reasons: First, "Mrs. Disney's presence on the round-the-world trip and the two trips to Europe served to enhance the firm's image abroad" and second, Mrs. Disney "assisted her husband in business activities and her travel was for a bona fide business purpose."

The District Court erred as a matter of law in relying on the enhancement of the corporate image of the taxpayer's employer as a necessary justification for a deduction of his wife's traveling

expenses. Since the only issue in the case is whether the taxpayer may deduct the travel expenses of his wife as ordinary and necessary business expenses paid or incurred in carrying on his trade or business, it is only the relationship of these expenses to his business which is relevant. This principle is well established by the applicable income tax Regulations and case law. Thus, even if Mr. Disney's employer could deduct the amount of its reimbursement of travel expenses from its gross income, as an ordinary and necessary business expense paid in carrying on its trade or business, on the assumption that her presence on the trips aided and promoted its business, it would not necessarily follow that the taxpayer is entitled to a deduction from his gross income. That result would obtain only if in fact Mrs. Disney assisted her husband in his business activities and rendered other than wifely and personal services.

The District Court's finding that Mrs. Disney "assisted her husband in business activities" and, impliedly, that "her travel was for a bona fide business purpose" insofar as her husband's business was concerned, is clearly erroneous. The record reveals that Mrs. Disney's activities on the trips in question were exclusively wifely and social. She answered the telephone, took care of Mr. Disney's laundry and dry cleaning and accompanied him to screenings, exhibitions, receptions and dinners, socializing with employees and business associates. These are the kind of activities which any wife would engage in and are only "incidental duties" which do not reflect a bona fide business purpose for her travel.

If Mrs. Disney had performed any substantial business-oriented services for her husband, as, for example, acting as his secretary, her travel expenses would be deductible as an ordinary and necessary expense of his business. However, when her activities amount only to the kind of activity which any wife would engage in when she accompanies her husband on a trip, her travel expenses are nothing more than the non-deductible personal expenses of her husband and not his business expenses.

The District Court, in finding that Mrs. Disney's presence on the trips "enhanced the firm's image abroad" erred in failing to address itself clearly and unequivocally to the relevant question whether Mrs. Disney's activities on the trips were so related to the taxpayer's carrying on of his trade or business as to warrant treatment of her travel expenses as his ordinary and necessary business expenditures. Moreover, even when the District Court purported to address itself to a scrutiny of the nature of Mrs. Disney's services, vis-a-vis her husband's business, its findings that Mrs. Disney "assisted her husband in business activities" and that "her travel was for a bona fide business purpose" are clearly erroneous in the light of the overwhelming evidence that all she did was to render wifely and personal services.

ARGUMENT

I

THE AMOUNTS WHICH THE TAXPAYER'S EMPLOYER PAID TO COVER THE TRAVEL EXPENSES OF THE TAXPAYER'S WIFE, WHO ACCOMPANIED HIM ON HIS BUSINESS TRIPS, IS INCLUDIBLE IN THE TAXPAYER'S GROSS INCOME

The initial question in the case is whether the travel expenses of Mrs. Disney, including the amounts spent for her food and lodging, which were paid by her husband's employer, Disney Productions, when she accompanied her husband on business trips, ^{2/} constitute the taxpayer's gross income. If the answer is in the affirmative, the question then is whether the taxpayer may deduct the amounts as his ordinary and necessary business expense. If deductible, the taxpayer would have no income tax liability since the deductions would offset the amounts included in his gross income. On the other hand, if those amounts do not constitute ordinary and necessary business expenses, the taxpayer's taxable income would be increased to the extent of Mrs. Disney's reimbursed travel expenditures.

There is no justifiable reason for excluding Mrs. Disney's reimbursed travel expenses from taxpayers' gross income. ^{3/} Section 61(a) of the Internal Revenue Code (Appendix, infra) defines "gross income" as meaning "all income from whatever source derived, including (but not limited to), * * * (1) Compensation for services, including fees, commissions, and similar items; * * * ." The language of Section 61(a) (and its predecessor provisions in prior revenue laws) "is broad enough to include in taxable income any

^{2/} Disney Productions paid for Mr. and Mrs. Disney's travel expenses either by paying for their transportation and personal living expenses directly or by advancing sums to Mr. Disney for this purpose. Solely for purposes of convenience, we will refer to Mrs. Disney's expenses as reimbursed travel expenses.

^{3/} Since Mr. and Mrs. Disney filed joint returns, the amounts which the company paid for Mrs. Disney's travel expenditures are includible in the gross income reportable in those returns if they constitute gross income to either party.

economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected" (Commissioner v. Smith, 324 U.S. 177, 191, rehearing denied, 324 U.S. 596), and clearly expresses "the intention of Congress to tax all gains except those specifically exempted" (Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430; Commissioner v. LoBue, 351 U.S. 243; see also, James v. United States, 366 U.S. 213, 219; Rudolph v. United States, 370 U.S. 269, 273).

The Committee Reports on the 1954 Code make it clear that Congress intended to exercise its fullest taxing power in Section 61, stating (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A18-A19 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4155); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 168-169 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4802)):

Section 61(a) provides that gross income includes "all income from whatever source derived." This definition is based upon the 16th Amendment and the word "income" is used in its constitutional sense.

Where, as in this case, an employer pays for goods or services for the benefit of his employee or his employee's wife, those expenditures clearly constitute income unless they are gifts. There was no contention in this case, nor could any have been successfully made, that Disney Productions intended the reimbursed travel expenses of Mrs. Disney to be gifts to either Mr. or Mrs. Disney. True, in its findings of fact, the court below stated that the reimbursement of Mrs. Disney's travel expenses "was not intended to be * * * [compensatory] in nature." (I-R. 149.) However, in the absence

of any allegation that the company's payment of Mrs. Disney's travel expenses were gifts and in the absence of any evidence indicating the requisite "disinterested generosity"^{4/} on the part of Disney Productions, the court's statement can be reasonably construed only as a legal conclusion that the reimbursed expenses did not constitute gross income and not as a finding that gifts were made. Thus, since the payments made on Mrs. Disney's behalf were not gifts, and do not fall within any of the other exceptions to the definition of gross income contained in the Code (e.g., Section 119), they clearly constitute gross income. The fact that the benefit to the Disneys was conferred in the form of the payment of travel expenses rather than cash of course does not affect this result, such gross income includes the value of goods and services received as well as cash. Section 1. 61-2(d), Treasury Regulations on Income Tax (1954 Code) (Appendix A, infra); see, e.g., Koons v. United States, 315 F. 2d 542 (C.A. 9th); Commissioner v. Fender Sales, Inc., 338 F. 2d 924, certiorari denied, 382 U.S. 813. Nor does the fact that the taxpayer, in other circumstances than the present, might have been entitled to deduct the amounts representing reimbursements for his wife's travel expenses as his ordinary and necessary business expenses foreclose the initial includibility of those amounts in gross income. See Warwick v. United States, 236 F. Supp. 761 (E.D. Va.), the case upon which the taxpayer and the court below chiefly relied. See also Patterson v. Thomas, 289 F. 2d 108 (C.A.

^{4/} Commissioner v. Duberstein, 363 U.S. 278.

5th); Moorman v. Commissioner, 26 T.C. 666; cf. Walkup Drayage & Warehouse Co. v. Commissioner, decided June 25, 1945 (P-H Memo T.C., par. 45,241).

We have been able to find only two cases in which reimbursed traveling expenses were excluded from gross income on the ground that the expenditures were ordinary and necessary business expenses. Allenberg Cotton Co. v. United States (D.C. Tenn.), decided December 2, 1960 (7 A.F.T.R. 2d 368), and McDonnell v. Commissioner, decided January 31, 1967 (26 T.C.M. 115). Neither of the opinions cited any authority for the holding, and although the results in both cases can be justified--since the expenses could have been found to be deductible from gross income--the courts' exclusion of the reimbursed traveling expenses from gross income was wrong.

McDonnell, for example, involved a husband and wife who travelled to Hawaii to chaperone a group of salesmen who had won a company sales contest. The travel expenses of both Mr. and Mrs. McDonnell were paid directly by his employer. The Tax Court held that the expenses were excludible from gross income. Since the record before the court showed that the trip was a business trip for both the husband and his wife, "whose duties were substantial and could not have been performed by stag men," the court's conclusion that the travel expenses should not be taxable to the taxpayers was justifiable. Its exclusion of the expenditures from gross income, however, was erroneous.^{5/} The holding is in

^{5/} The Commissioner has acquiesced only in the result reached by the court in the case.

conflict with the general principles of income realization we have discussed above. Furthermore, the decision does not represent the Tax Court's position on the matter; in Jenkins v. Commissioner, decided December 27, 1967 (P-H Memo T.C., par. 67-257), the court held that reimbursed travel expenditures constituted gross income even if deductible as ordinary and necessary business expenses.

Thus, the travel expenses of Mrs. Disney which were paid by her husband's employer constituted the taxpayer's gross income and the court's contrary conclusion was wrong as a matter of law.

II

MRS. DISNEY'S TRAVEL EXPENSES WERE NONDEDUCTIBLE PERSONAL LIVING EXPENSES AND NOT DEDUCTIBLE ORDINARY AND NECESSARY BUSINESS EXPENSES OF THE TAXPAYER

Although Mrs. Disney's travel expenses are includible in the taxpayer's gross income, they are not necessarily taxable. The real question in this case is whether, includible in gross income, they are nevertheless deductible under Section 162 as ordinary and necessary business expenses of the taxpayer, or are nondeductible under Section 262 as personal expenses.

Section 162 (Appendix A, infra) provides:

(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

* * * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

* * * * *

(26 U.S.C. 1964 ed., Sec. 162.)

Section 262, on the other hand, provides:

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1964 ed., Sec. 262.)

Unhappily, these two sections are not self-limiting. As Justice Holmes has reminded us, "all rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is formed * * *." Hudson Water Co. v. McCarter, 209 U.S. 349, 355. So it is with business and personal expenses. Each can be carried to a logical extreme. For example, everyone must wear clothes to work, and logically, the cost of clothing could be a business expense. It is clear, however, that unless an employee is required to wear a uniform, the cost of ordinary clothing is a nondeductible personal expense. See 4A Mertens, Law of Federal Income Taxation, Sec. 25.123. Similarly, with travel expenditures, although few can live within walking distance of their jobs, all commuting expenses are nondeductible personal expenses even though they are necessarily incurred to enable a taxpayer to reach his place of business. Commissioner v. Flowers, 326 U.S. 465. The line of demarcation between an ordinary and necessary business expense and a personal expense recognizes that where a large personal component exists in an expense, it should be regarded as nondeductible even though it

may have some kind of relationship to the expender's business.

The need to arrive at an accomodation between the competing principles of Sections 162 and 262 also exists with respect to the expenses of a taxpayer's wife. Few can doubt that an attractive, intelligent and socially-responsive wife helps a man in his business or profession. But it is difficult to imagine that anyone would argue that the cost of his wife's clothes, hairdos, or social activities normally is deductible as a business expense.

Similarly, in the case of a wife who accompanies her husband on a business trip, few would doubt that she is of some kind of assistance to him. She will take care of his personal affairs (e.g., laundry, valet service), take telephone messages for him, and accompany him to social events--all helpful to him in his business. But these are precisely the functions any wife performs at home, and it is difficult to see why the husband should be permitted to deduct her ordinary living expenses (food and lodging), and travel expenses when they are away from home, as ordinary business expenses when they are clearly not deductible under ordinary circumstances. Such expenses may be "concomitants" to the business operated by some persons "[but] they are not ordinary and necessary business expenses" because they are not economically an integral part of the business. See Commissioner v. Doyle, 231 F. 2d 635 (C.A. 7th).

Accordingly, Section 1.162-2 of the Treasury Regulations (Appendix A, infra) provides:

§1.162-2. Traveling expenses.

* * * * *

(c) Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

* * * * *

(26 C.F.R., Sec. 1.162-2.)

The court below held that Mrs. Disney's travel expenses were deductible because it found that "[her] presence on the round the world trip, the two trips to Europe and the domestic trip served to enhance the corporate image abroad, she assisted her husband in business activities, and her travel was for a bona fide business purpose." (I-R. 142, 149.)

The District Court's initial error was its reliance on the enhancement of Walt Disney Production's corporate image as justifying the deduction of Mrs. Disney's traveling expenses. The deductibility of a wife's travel expenses rests exclusively on the relationship of those expenses to her husband's business and not on their relationship to her husband's employer's business. See Section 1.162-2(a), Treasury Regulations on Income Tax (1954 Code). Even if Mrs. Disney's presence enhanced the image of Walt Disney Productions abroad, it would not provide the basis for a deduction of her traveling expenses from gross income, since only the ordinary and necessary business expenses of Mr. Disney are properly

deducted by him from his gross income. Patterson v. Thomas, 289 F. 2d 108 (C.A. 5th); Challenge Manufacturing v. Commissioner, 37 T. C. 650; Moorman v. Commissioner, 26 T.C. 666; Rudolph v. United States, 189 F. Supp. 2 (N.D. Texas), affirmed, 291 F. 2d 841 (C. A. 5th), writ of certiorari dismissed as improvidently granted, 370 U.S. 269. The deductible nature of the reimbursement for Mrs. Disney's traveling expenses must be judged, in this context, from the taxpayer's viewpoint, not from the viewpoint of Walt Disney Productions. As the Fifth Circuit noted in Patterson v. Thomas, supra, pp. 112-113, in holding that amounts paid by the taxpayer's employer to a hotel and a travel agency for accommodations, meals, and a sight-seeing trip for the taxpayer and his wife constituted gross income to the taxpayer and were not deductible by him:

At the outset, it is important to note that the nature of the trip must be determined from the individual taxpayer's point of view, rather than from the point of view of his employer. To illustrate, an employer may find the efficiency of his salesmen is greatly increased if he gives them a two-week, all-expense-paid vacation trip to Florida as a reward for increasing sales. From the employer's point of view, the amounts he expends in providing the trip may be business expenses deductible by him. But to the recipient, that trip is solely for pleasure. Although "connected with" his business, the salesman who goes on the Florida jaunt is receiving income, just as if the prize in the sales contest were a bonus, and the amounts expended in going to Florida and spending the two weeks there would be nondeductible personal expenditures. We note, therefore, that the deductibility of sums as business expenses by an employer is immaterial in determining whether the expenditure of those sums by their recipient is deductible by him as an ordinary or necessary business expense. 6/

6/ Judge Brown dissented in Thomas on the ground that because the taxpayer and his wife were compelled from the business standpoint to attend the convention sponsored by his employer the expenses of

(Continued)

Thus, in this case, the enhancement of Disney Productions' corporate image might provide a basis for the corporation's deducting the amount of Mrs. Disney's travel expenses, but it does not provide a basis for Mr. Disney's deduction of those amounts, and the court's reliance on this fact was erroneous. See also Sheldon v. Commissioner, 299 F. 2d 48 (C.A. 7th).

The District Court also found that Mrs. Disney "assisted her husband in business activities, and her travel was for a bona fide business purpose." (I-R. 142, 149.) Since the court did not specify how Mrs. Disney "assisted her husband in business activities," it is difficult to know on what basis the court reached its conclusion that "her travel was for a bona fide business purpose." The only activities the court referred to were Mrs. Disney's attendance at "various dinners, social functions, film screenings, and other gatherings of employees, exhibitors, distributors, other

6/ (Continued)

both of them were deductible. It is noteworthy that he agreed with the majority that the travel expenses of the taxpayer and his wife paid by his employer on their behalf was income to them and that the deductibility of these amounts should be considered from the standpoint of the taxpayer and not his employer. It is also noteworthy that the business compulsion which Judge Brown relied on in his dissent in Thomas is not present here. The taxpayer in Thomas may have been required to attend the convention with his wife or lose the opportunity for advancement, but Roy Disney, the president and chief executive officer of Disney Productions, was under no comparable corporate compulsion to take his wife along on his foreign trips.

The District Court's statement that Walt Disney Productions "has virtually insisted on the wives' presence" on extended business trips reflects nothing more, in our view, than a company preference that wives accompany their husbands on the husbands' business trips. This is far short of a requirement, in the sense of Judge Brown's dissent in Thomas. Furthermore, it is apparent that to the extent the company's policy could be loosely called a "requirement", it was adopted only as an afterthought for the purposes of this litigation. (III-R. 233, 242-243.)

business associates, the press, and the public." (I-R. 147.) Her presence at these events may have enhanced Walt Disney Productions' image, and the court appeared to consider them relevant only from this standpoint (I-R. 139); there is no indication in the court's opinion or findings of fact and conclusions of law--other than what is reflected in its either irrelevant or conclusory findings (e.g., findings Nos. 13 and 21)--to what extent, if any, these activities assisted her husband on the trips in carrying on his trade or business.

Since it is difficult to fathom the grounds for the court's determination, we must turn to the record to determine whether Mrs. Disney's activities were of such substantial assistance to her husband that they should be deductible by him as ordinary and necessary business expenses. We submit that they were not and the court's conclusion that Mrs. Disney's travel was undertaken principally for a bona fide business purpose of her husband was "clearly erroneous." Commissioner v. Duberstein, 363 U.S. 278; United States v. Gypsum Co., 333 U.S. 364, 395.

The record reveals that Mrs. Disney's activities on the trips were in the nature of wifely duties, such as taking care of their laundry and valet requirements, taking telephone messages when she was in the hotel and keeping track of their personal expenditures. When she was not in the hotel during the day she would be shopping or attending a movie. (I-R. 139.) She also attended screenings and social events, like dinners and cocktail parties,

along with her husband. ^{7/} Although these activities undoubtedly were of some help to Mr. Disney as concomitants to his business activities, we submit that they are so close to the sort of thing that any wife does for her husband whether they are at home or traveling as to fall within the embrace of personal activities and do not demonstrate a bona fide business purpose for her trip sufficient to justify a deduction of her traveling expenses from her husband's income. See Section 1.162-2(c), Treasury Regulations on Income Tax (1954 Code); Rev. Rul. 55-57, 1955-1 Cum. Bull. 315; Rev. Rul. 56-168, 1956-1 Cum. Bull. 93.

With one exception, in those cases in which a husband has been allowed to deduct his wife's traveling expenses, the evidence revealed that the wife performed substantial services for her husband which assisted him in carrying on his trade or business. For example, in Duncan v. Bookwalter, 216 F. Supp. 301 (W.D. Mo.), Mrs. Duncan handled the details of the trip; in Allenberg Cotton Co. v. United States, supra, Mrs. Allenberg, who was a nurse, took care of her husband, who was diabetic; in McDonnell v. Commissioner, supra, Mrs. McDonnell was assigned the specific duty of chaperoning the wives of company employees, a task which the court found could not have been performed by a man. Finally, in Thomas v. Commissioner, decided March 14, 1939 (P-H Memo B.T.A., par. 39,112), Mrs. Thomas

^{7/} So that the Court need not read the entire transcript, the following transcript references contain the testimony regarding Mrs. Disney's activities when traveling with her husband with the exception of her sightseeing activities: II-R. 28, 30-32, 35-36, 39-40, 42, 48-54, 57, 63-65, 91-100, 101, 110, 148; III-R. 163-170, 172-173, 182-189, 191-194, 196-197, 201, 224.

acted as her husband's secretary and singing coach. Mrs. Disney, however, performed no comparable functions on the trips she took with her husband. She made no arrangements for the trip, performed no secretarial or similar duties, did not take part in any business discussions, and even with regard to her social activities, it does not appear that she made any arrangements or planned any dinners or cocktail parties. To the extent that she did help her husband by taking telephone messages, it amounted only to an "incidental service" which does not make the costs of her trip deductible. Regulations Section 1.162-2(c). In short, Mrs. Disney did only what any wife would do to help her husband in the normal course of events; her activities do not suggest a bona fide business purpose justifying the deduction of her travel expenses.

The District Court appeared impressed with the fact that Mrs. Disney's trip did not amount to a vacation. This conclusion is doubtful at best. She did engage in a large amount of sightseeing on the round-the-world trip with her sister and brother-in-law, who were concededly on vacation, and the testimony at the trial indicates that she engaged in substantial recreational activities on her trips.^{8/} Even if it was not a vacation, it does not follow that her presence must have a bona fide business purpose. A wife may accompany her husband, for his personal convenience--to provide companionship, help him with small personal details, and provide a

^{8/} The testimony regarding the Disneys' and Vogels' sightseeing activities can be found at II-R. 112-126, and III-R. 185-190.

congenial atmosphere for him and for his acquaintances when he is away from home. That, we submit, was the reason Mrs. Disney accompanied her husband on his business trips. In order to prevent the deduction of such expenses, which would clearly be personal, the Regulations and cases require some demonstration that the wife is performing substantial services for her husband (as opposed to her husband's employer). Such evidence is lacking in this case, and the District Court was clearly in error in concluding that Mrs. Disney's travel was for a bona fide business purpose vis-a-vis the carrying on of her husband's trade or business. Thus, if the District Court had reached the question whether the taxpayer could deduct the amounts paid for his wife's travel expenses, it would have been required to respond in the negative, since the taxpayer would of course have had the burden of proving that he was entitled to the deduction and had failed in meeting that burden.

The taxpayer and the District Court relied heavily on Warwick v. United States, 236 F. Supp. 761 (E.D. Va.). We submit that that case does not possess significant precedential value for this Court. In Warwick, the District Court permitted the taxpayer to deduct the cost of his wife's travel expenditures when she accompanied him on foreign trips. The court reached its conclusion to a large extent on the very unusual position that the taxpayer occupied in the business world requiring him to establish extremely close connections with a very small number of potential foreign customers. The court found that the presence of his wife was

necessary to establish that relationship. In this case, there is no showing in the record that Mr. Disney occupied a position different from any executive with a product he is trying to sell. That product, which the court described as "family type entertainment," (I-R. 137), may be "rather unique" (II-R. 82), but Mr. Disney's position is not, and, therefore, not comparable to Mr. Warwick's. Furthermore, Mrs. Warwick entertained customers and their wives in her hotel. There is no showing that Mrs. Disney did any comparable entertaining. All that she did was accompany her husband to social events. The evidence overwhelmingly points to the conclusion that Mrs. Disney did not accompany her husband on the trips involved here principally for a bona fide business purpose relating to her husband's business, but that she accompanied him for personal non-business considerations. Accordingly, her travel expenses may not be treated as the ordinary and necessary business expenses of carrying on his trade or business, but must be regarded as non-deductible personal expenses.

CONCLUSION

The judgment of the District Court should be reversed and judgment entered for the United States.

Respectfully submitted,

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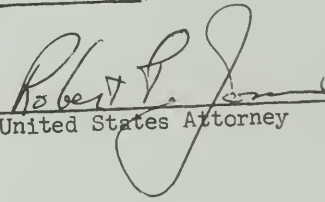
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APRIL, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 15th day of April, 1968.


Robert T. Jones
Asst. United States Attorney

APPENDIX A

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for services, including fees, commissions, and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalties;
- (7) Dividends;
- (8) Alimony and separate maintenance payments;
- (9) Annuities;
- (10) Income from life insurance and endowment contracts;
- (11) Pensions;
- (12) Income from discharge of indebtedness;
- (13) Distributive share of partnership gross income;
- (14) Income in respect of a decedent; and
- (15) Income from an interest in an estate or trust.

* * * * *

(26 U.S.C. 1964 ed., Sec. 61.)

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

* * * * *

- (2) [as amended by Sec. 4(b) of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960] 9/traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or

9/ This amendment, applicable to the taxable year 1963, does not materially affect this case.

extravagant under the circumstances) while away from home in the pursuit of a trade or business; * * *

* * * * *

(26 U.S.C. 1964 ed., Sec. 162.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.61-1 Gross income.

(a) General definition. Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. Section 61 lists the more common items of gross income for purposes of illustration. For purposes of further illustration, § 1.61-14 mentions several miscellaneous items of gross income not listed specifically in section 61. Gross income, however, is not limited to the items so enumerated.

* * * * *

(26 C.F.R., Sec. 1.61-1.)

§ 1.61-2 Compensation for services, including fees, commissions and similar items.

* * * * *

(d) Compensation paid other than in cash--(1) In general. If services are paid for other than in money, the fair market value of the property or services taken in payment must be included in income. If the services were rendered at a stipulated price, such price will be presumed to be the fair market value of the compensation received in the absence of evidence to the contrary. However, for special rules relating to certain options received as compensation, see § 1.61-15 and section 421 and the regulations thereunder.

(2)(i) Property transferred to employee or independent contractor. Except as otherwise provided in section 421 and the regulations thereunder (relating to employee stock options) and § 1.61-15, if property is transferred by an employer to an employee, or if property is transferred to

an independent contractor, as compensation for services for an amount less than its fair market value, then regardless of whether the transfer is in the form of a sale or exchange, the difference between the amount paid for the property and the amount of its fair market value at the time of the transfer is compensation and shall be included in the gross income of the employee or independent contractor. In computing the gain or loss from the subsequent sale of such property, its basis shall be the amount paid for the property increased by the amount of such difference included in gross income.

* * * * *

(3) Meals and living quarters. The value of living quarters or meals which an employee receives in addition to his salary constitutes gross income unless they are furnished for the convenience of the employer and meet the conditions specified in section 119 and the regulations thereunder. For the treatment of rental value of parsonages or rental allowance paid to ministers, see section 107 and the regulations thereunder; for the treatment of statutory subsistence allowances received by police, see section 120 and the regulations thereunder.

* * * * *

(26 C.F.R., Sec. 1.61-2.)

§ 1.162-2 Traveling expenses.

(a) Traveling expenses include travel fares, meals and lodging, and expenses incident to travel for such as expenses for sample rooms, telephone and telegraph, public stenographers, etc. Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including travel fares, meals and lodging, and expenses incident to travel, are business expenses. For the allowance of traveling expenses as deductions in determining adjusted gross income, see section 62 (2)(B) and the regulations thereunder.

(b)(1) If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling

expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.

(2) Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary.

(c) Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

* * * * *

APPENDIX B

The Exhibits were admitted, as follows:

Plaintiff's Exhibits:	In Evidence ^{10/}
1	R. 22
2	R. 37
Defendant's Exhibits:	
A	R. 328
B	R. 337

^{10/} References are to the transcript of the proceedings below which are contained in Volumes II and III of the record on appeal.

